> The defendant spent much of March 17, 1998, at the hospital being treated for injuries sustained in a car accident on the way to central booking and therefore, was not in a continuous custodial environment. Moreover, the second interrogation concerned a crime unrelated to that for which he was initially arrested.

(A. 78a.)

The Federal Proceedings (See Pet. at 11-13)

The Petition fails to indicate the following aspects of the District Court's decision.

The District Court agreed with the Appellate Division that Respondent's constitutional rights had been violated in the taking of the confession. (A. 69a.) The District Court characterized the error as involving Respondent's "constitutional right to counsel" (A. 67a) and "Miranda rights" (A. 69a).

The District Court found: that when the police administered the Miranda warnings to Respondent, "he refused to talk about the theft, although he did talk about other matters"; that when the police attempted to question Respondent about the murder, he "stated he wanted a lawyer"; and that the police advised Respondent that they could not speak to him if he wanted a lawyer. (A. 56a.)

The Petition also fails to indicate that the Second Circuit agreed with these findings of the District Court (A. 3a), and held that the District Court had properly adopted the Appellate Division's findings (A. 22a). While the Petition does indicate that the Second Circuit held that the admission of Respondent's confession violated his "due process rights" (Pet. at 19 (citing A. 22a)), the Petition fails to indicate that the Second Circuit based

this holding on the "'totality of the circumstances.'" (A. 22a (quoting Arizona v. Fulminante, 499 U.S. 279, 286 (1991).)

In seeking to have the Second Circuit affirm the District Court's judgment on the alternative ground that there was no constitutional error in the admission of Respondent's confession, Petitioner's appellate brief (at 39-40) acknowledged that once a suspect invokes the right to remain silent, then the police may not question the suspect again, even about a different crime, without renewed Miranda warnings and the passage of a significant amount of time. See Arizona v. Roberson, 486 U.S. 675, 683-84 (1988); Michigan v. Mosely, 423 U.S. 96, 106 (1975). In that brief (at 39-40), Petitioner nevertheless argued that Respondent did not invoke his right to remain silent when he told the police that he did not wish to speak about the theft because he did not wish to go to jail. Respondent's reply brief in the Second Circuit (at 20-22) took issue with this argument. In her dissenting opinion in the Second Circuit, Judge Raggi acknowledged that Mosely would have been violated if the District Court and the Second Circuit were correct that Respondent had told the police that he refused to speak about the theft; but Judge Raggi believed that the record was ambiguous on this subject. (A. 52a.)

Also in his Second Circuit brief (at 41-42), Petitioner acknowledged that the police may not question a suspect in custody if the suspect makes an unequivocal request for counsel. Smith v. Illinois, 469 U.S. 91, 95 (1984) (per curiam); see Roberson, 486 U.S. at 677-78. Petitioner nevertheless argued in that brief (at

41-42) that there was no invocation of the right to counsel here because, after Respondent indicated his desire for counsel and the police told him that they could not speak to him if he obtained counsel, Respondent stated that he wanted to speak to an assistant district attorney, not to a defense attorney. (See Pet. at 5-6.) Respondent's reply brief in the Second Circuit (at 23-25) took issue with this argument.

Having found the due process violation, the Second Circuit did not reach these additional arguments. (A. 22a.)

REASONS FOR DENYING THE WRIT

POINT I

THE SECOND CIRCUIT MERELY APPLIED SETTLED LAW, RECOGNIZED BY THIS COURT AND THE OTHER CIRCUITS, TO THE FACTS WHEN IT AGREED WITH THE CONCLUSION OF THE DISTRICT COURT AND THE APPELLATE DIVISION THAT THE POLICE OBTAINED RESPONDENT'S CONFESSION IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

The first question presented in the Petition (Pet. at i) and the first point heading in the Reasons for Granting the Writ portion of the Petition (Pet. at 15) portray the issue before this Court--an issue on which the circuit courts supposedly are in conflict--as the extent to which the passage of time has an effect on the efficacy of Miranda[4] warnings. That portion of the Petition contends that the Second Circuit agreed with the other courts in this case that Respondent's confession was obtained in violation of his constitutional rights "primarily because defendant made that

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[4]Miranda v. Arizona, 384 U.S. 436 (1966).

statement 24 hours after he received Miranda warnings." (Pet. at 14.) That portion also begins by implying that the Second Circuit, unlike the other circuit courts, utilized a "per se" approach to conclude that Respondent's rights were violated on the basis of the passage of time. (Pet. at 15-16).

However, the Second Circuit did not use a "per se" approach. Rather, although the Petition does not so indicate, the Second Circuit specifically stated that it based its holding on the "totality of the circumstances." See supra pp. 5-6.

The Statement of the Case in the Petition similarly mischaracterizes the Appellate Division's holding in this respect, which holding specifically rejected a "per se" approach. See supra pp. 4-5.[5] Nor does the Petition indicate anywhere that the District Court agreed with the Appellate Division's position, or that the Second Circuit approved of the District Court's agreement with the Appellate Division (A. 22a).

To the extent that anyone is espousing a "per se" approach or placing primacy on the amount of time that elapsed since the administration of Miranda warnings, it is Petitioner in the Petition, by attempting to create a conflict among the circuit courts--indeed, a conflict supposedly so severe as to warrant this Court's intervention--based solely on the fact that cases from other circuit courts, also utilizing a totality-of-the-

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[5]Later in the Reasons for Granting the Writ portion, the Petition finally acknowledges to some extent that both the Second Circuit and the Appellate Division did not use per se approaches. (A. 19a.)

circumstances approach, found no constitutional violations despite the fact that more than 24 hours had elapsed since the administration of Miranda warnings in the cases before those courts. Obviously, in virtually any case in which a federal appellate court finds a constitutional violation in part because of the time that elapsed since the administration of the warnings, the losing party can cite other circuit court cases in which the elapsed time was greater and yet the courts found no violation. And yet it would not be appropriate for this Court to review such cases on the basis on an alleged "conflict" among the circuits.

Indeed, when one puts aside the question of the time elapsed since the administration of the Miranda warnings and looks at the other factors in this case that support the conclusion of the Second Circuit, the District Court, and the Appellate Division, one is struck by the absence of those factors in the circuit court, and even the state, cases cited in the Petition, as well as in this Court's decision in Wyrick v. Fields, 459 U.S. 42 (1982) (per curiam). (See Pet. at 16-19.)

In the instant case, not only did Respondent fail to make a statement when the police administered the Miranda warnings shortly after his arrest, but he specifically told the police that he did not wish to make a statement about the alleged theft for which he was arrested, as he did not want to go to jail, and he even tried to escape from police custody. See supra p. 2. So when the police indicated to Respondent 24 hours later their desire to question him about a murder, he could hardly have believed that his expressed

wish not to incriminate himself was being honored, or that any similar expressions would be honored in the future. See, e.g., Miranda, 384 U.S. at 468-69; see also Arizona v. Roberson, 486 U.S. 675, 683-84 (1988).

In contrast, in all of the cases cited in the Petition, the defendant had waived his or her Miranda rights--and, in all the federal cases, the defendant also had answered the police questions about the crime--when the police administered the Miranda warnings.

Moreover, in the instant case, the police questioned Respondent about a different crime from the one as to which they had originally administered the Miranda warnings. Indeed, Miranda specifically holds that the need for Miranda warnings cannot be obviated by "the defendant['s] . . . prior contact with authorities." 384 U.S. at 468-69. And in Michigan v. Mosely, 423 U.S. 96, 106 (1975), this Court held that where the defendant invokes the right to remain silent as to one crime, the police may question the defendant as to a different crime provided that new warnings are given. See also Roberson, 486 U.S. at 683-84.

In contrast, in all of the cases cited in the Petition, the subsequent questioning was on the same crime as that as to which the police had administered the warnings.

Further, Respondent was not in a continuous police custodial environment between the administration of the Miranda warnings and the questioning concerning the murder. Rather, he had spent approximately eight hours immediately proceeding that questioning in the hospital. Moreover, he was in the hospital because he had

been struck by a car. After the police had him removed from the hospital around 1:00 a.m. so that they could speak to him, he seemed tired and was limping. See supra pp. 2-3. These factors make it even less likely that Respondent would have believed that any request to remain silent was being, or would be, honored, or that Respondent would have fully comprehended the applicability of all of his Miranda rights to the murder investigation, or would have remembered all of those rights.

In contrast, in all of the federal cases cited in the Petition save one, the defendant was continuously in a police custodial environment, and in none of those cases was there any indication of anything questionable about the defendant's physical or mental condition at the time of the subsequent questioning.[6]

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[6]In Biddy v. Diamond, 516 F.2d 118 (5th Cir. 1975), cert. denied, 425 U.S. 950 (1976), the defendant was arrested, provided with the Miranda warnings, signed a written waiver of his rights, and answered questions about the crime. Twelve days later, during which interval he was not in continuous police custody, he answered questions about the same crime without Miranda warnings. The court held that no new warnings were needed. Id. at 120-22.

In People v. Mickle, 814 P.2d 290 (Cal. 1991), cert. denied, 503 U.S. 988 (1992), the defendant had turned himself in for questioning about the crime at issue. He was interviewed three times over a four-hour period, waived his Miranda rights more than once, and gave incriminating statements. Thereafter, he was suspected of being a suicide risk, and he spent a night in the hospital, and a nurse characterized it as having been a "bad" night. At 10 o'clock the next morning, the police visited the defendant in the hospital. "He looked calm and normal." They spoke to him for ten minutes without new warnings about the same crime, and the court held that no new warnings were needed. Id. at 304-05.

In Koger v. State, 17 P.3d 428 (Nev. 2001) (per curiam), the police administered Miranda warnings, and the defendant then answered questions about the crime. Later that day, the warnings were administered again, and he signed a Miranda waiver form. Two weeks later, he was interviewed again, about the same crime, without new warnings. Although he had not been in police custody

Most importantly, as the Second Circuit held (A. 22a), when all of these factors are considered together, this case is distinguishable from all of the cases cited in the Petition because the issue here is not merely whether or not renewed Miranda warnings should have been given, but whether Respondent's confession was involuntary and thus was obtained in violation of due process. There is simply no reason for this Court to review this case to correct any perceived conflict with cases from other jurisdictions.

Moreover, even were this Court to grant certiorari herein and rule that there was no Miranda or due process violation on the basis of the totality-of-the-circumstances approach, there would still be the questions whether Respondent invoke his right to remain silent, requiring new Miranda warnings, or invoked his right to counsel, thus barring any further questioning even with new warnings. See supra pp. 2-3, 5-7. (See also Pet. at 6; A. 85a.) These are substantial questions which the Second Circuit would have to resolve upon remand, unless this Court thought it appropriate to resolve them itself in the first instance, but see Dandridge v. Williams, 397 U.S. 471, 475-76 (1970); Aetna Casualty Co. v. Flowers, 330 U.S. 464, 468 (1947); United States v. Ballard, 322 U.S. 78, 88 (1944).

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during that two-week interval, there was no indication that his mental or physical condition was impaired during that final interview. The court held that no new warnings were required. Id. at 429-30.

Accordingly, this Court should not grant certiorari on the question of whether the Second Circuit and the other courts below were correct in finding a violation of Respondent's constitutional rights in the admission of his confession to the police.

POINT II

THE QUESTION OF THE APPROPRIATE HARMLESS-ERROR STANDARD TO BE APPLIED IN THIS CASE IS A RELATIVELY INCONSEQUENTIAL ONE AS TO WHICH THIS COURT HAS REPEATEDLY DENIED CERTIORARI, AND IF THIS COURT WERE DISPOSED TO RESOLVE THAT QUESTION AND MORE IMPORTANT, RELATED QUESTIONS, THIS CASE DOES NOT PROVIDE THE PROPER VEHICLE FOR DOING SO.

The Second Circuit in this case held that because the Appellate Division applied Chapman v. California, 386 U.S. 18, 24 (1967) in finding that the constitutional error was harmless, then the appropriate standard of review for the federal habeas courts is an application of AEDPA's "unreasonable application" rule to Chapman, 28 U.S.C. § 2254(d)(1), rather than the "substantial and injurious effect or influence" standard this Court enunciated for section 2254 cases in Brecht v. Abrahamson, 507 U.S. 619, 637 (1993). (A. 6a-8a.) The Second Circuit's holding followed by two days the same holding by a different panel of the Second Circuit in Gutierrez v. McGinnis, 389 F.3d 300, 303-07 (2d Cir. 2004), and followed a similar holding in the Eighth Circuit. Brown v. Luebbers, 371 F.3d 458, 469 (8th Cir. 2004) (en banc), cert. denied, 125 S. Ct. 1397 (2005); see Whitmore v. Kemna, 213 F.3d 431, 433 (8th Cir. 2000).

While that holding in this case continues a split among the circuit courts on this issue, a grant of certiorari in this case to resolve that conflict would be inappropriate, for a number of reasons. First, the difference in the two standards is a minor one, and rarely matters. Second, the difference fairly clearly does not matter in this case. Third, there are, or will be, other cases which more clearly present the issue of how the difference matters. Fourth, this Court has denied writs of certiorari to resolve this issue in the past. Fifth, ever since this Court decided Brecht more than a decade ago, there has been a circuit conflict on a related issue as to which there is a clear difference between the two standards: whether a habeas court should apply Brecht or Chapman where the state court did not apply Chapman; and yet, over the years, this Court has repeatedly denied petitions for writs of certiorari to resolve that more important issue. Finally, the Second Circuit's choice of the standard in this case is the correct one. Accordingly, the Court should deny the writ sought herein.

The difference between the Chapman and Brecht standards, while significant, is "less significant than it might seem." Brecht, 507 U.S. at 643 (Stevens, J., concurring); see O'Neal v. McAninch, 513 U.S. 432, 439 (1995) (noting importance of fact that Justice Stevens provided the fifth vote in Brecht). Both standards place the burden of proving an absence of prejudice on the prosecution. Id. at 437. Chapman requires proof beyond a reasonable doubt, Chapman, 386 U.S. at 24, while Brecht requires proof by

significantly more than a preponderance of the evidence.[7] So when one adds AEDPA's requirement that the state court's application of Chapman must be unreasonable, there is little practical difference between Brecht and AEDPA/Chapman.

The Second Circuit acknowledged as much in Gutierrez, 389 F.3d at 305-06 & n.6, and other circuit courts have echoed this sentiment, Bryson v. Ward, 187 F.3d 1193, 1205 & n.10 (10th Cir. 1999), cert. denied, 529 U.S. 1058 (2000); Nevers v. Killinger, 169 F.3d 352, 371-72 (6th Cir.), cert. denied, 527 U.S. 1004 (1999), abrogated on other grounds, Harris v. Stovall, 212 F.3d 940, 942 (6th Cir. 2000). Thus, prior to Gutierrez, in the cases in which the Second Circuit declined to decide the issue of which standard to use, that court either found that both standards were met, Ryan v. Miller, 303 F.3d 231, 253-56 (2d Cir. 2002); Noble v. Kelly, 246 F.3d 93, 101, 101-02 n.5 (2d Cir.), cert. denied, 534 U.S. 886 (2001), or found that neither standard was met, Fuller v. Gorczyk, 273 F.3d 212, 220-21 (2d Cir. 2001); Loliscio v. Goord, 263 F.3d 178, 185-91 & nn.1, 7 (2d Cir. 2001). Other circuits have had similar experiences. Allen v. Lee, 366 F.3d 319, 321 (4th Cir. 2004) (en banc, per curiam), cert. denied, 125 S. Ct. 208 (2005); Denny v. Gudmanson, 252 F.3d 896, 905 n.4 (7th Cir.), cert. denied, 534 U.S. 938 (2001); Anderson v. Cowan, 227 F.3d 893, 898 n.3 (7th

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[7]The Brecht standard is more burdensome on the prosecution than the harmless-error standard in cases involving ineffective assistance of counsel or prosecutorial suppression of exculpatory evidence. Kyles v. Whitley, 514 U.S. 419, 435-36 (1995). And the defendant satisfies that latter standard by proving prejudice by less than a preponderance of the evidence. Id. at 434.

Cir. 2000); Tucker v. Johnson, 242 F.3d 617, 629 n.16 (5th Cir.), cert. denied, 533 U.S. 972 (2001); Thomas v. Gibson, 218 F.3d 1213, 1225 n.12 (10th Cir. 2000); Whitmore, 213 F.3d at 433.

In both the instant case and in Gutierrez, the Second Circuit resolved the issue of the proper standard, not because it had to, but because of this Court's decision in Mitchell v. Esparza, 540 U.S. 12, 17-19 (2003) (per curiam), in which the Court used the AEDPA/Chapman standard in a section 2254 case. (A. 8a). Gutierrez, 389 F.3d at 306-07.[8] As Judge Raggi indicated in her dissent in this case, "I expect that the majority would conclude that the result it reaches today would pertain even under" the Brecht standard. (A. 26a-27a n.2.) After all, the Second Circuit in this case found the evidence against Respondent to have been "weak" (A. 10a); noted the great difficulty in finding a confession harmless (A. 20a-21a); relied on cases which employed the Brecht/Kotteakos[9] standard (A. 9a-10a, 15a); see Wray v. Johnson, 202 F.3d 515, 525-26 (2d Cir. 2000); United States v. Jean-Baptiste, 166 F.3d 102, 108 (2d Cir. 1999); placed great emphasis on the hung jury at the first trial (and the prosecution's greater use of the confession at the second trial);[10] and extensively discussed a host of other

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[8]In Penry v. Johnson, 532 U.S. 782, 793-76 (2001), both the Respondent's Brief (at 31) and the Petitioner's Reply Brief (at 16) sought application of the Brecht standard, without mentioning the AEDPA/Chapman standard, and thus this Court acceded to the parties' wishes without comment at oral argument or in its decision.

[9]Kotteakos v. United States, 328 U.S. 750 (1946).

[10]Federal courts employing the Brecht/Kotteakos standard not infrequently find prejudice based solely, or primarily, on the fact that the first jury hung. Ghent v. Woodford, 279 F.3d 1121, 1131

factors arguing in favor of a finding of prejudice, see supra pp. 3-4. Indeed, even were this Court to grant certiorari herein and decide that the Brecht standard is the appropriate one, the normal course would then be for this Court to remand the case to the Second Circuit to employ Brecht. Rose v. Clark, 478 U.S. 570, 584 (1986).

If there could be any appreciable difference between Brecht and AEDPA/Chapman, it would be in a case in which the circuit court found an unreasonable application of Chapman, not on the basis of the result reached by the state court, but on the basis of the reasoning of the state court. In applying section 2254(d)(1), this Court has focused on the result reached by the state court, Rompilla v. Beard, 125 S. Ct. 2456, 2005 U.S. LEXIS 4846, at *12-28 (June 20, 2005); Yarborough v. Alvarado, 541 U.S. 652, 660-69 (2004); Mitchell, 540 U.S. at 17-19; Bell v. Cone, 535 U.S. 685, 698-702 (2002), or on both that result and the reasoning applied by the state court, Wiggins v. Smith, 539 U.S. 510, 522-34 (2003);

(9th Cir. 2002) (focusing on hung jury and prosecution's change of trial strategy at second trial) (cited by Second Circuit herein at 16a-17a); United States v. Paquio, 114 F.3d 928, 935 (9th Cir. 1997) (sole ground); United States v. Thompson, 37 F.3d 450, 454 (9th Cir. 1994) (hung jury at first trial is "[p]ersuasive evidence of prejudice"); United States v. Ince, 21 F.3d 576, 579-85 (4th Cir. 1994) (finding plain, nonconstitutional error, primarily because first jury hung and because of devastating effect of confessions) (cited by Second Circuit herein at 15a); United States v. Sanders, 964 F.2d 295, 296-97, 299 (4th Cir. 1992); United States v. Boroni, 758 F.2d 222, 224-25 (7th Cir. 1985); United States v. Conley, 503 F.2d 520, 523-24 (8th Cir. 1974); United States v. McCarthy, 445 F.2d 587, 589-90 (7th Cir. 1971) (sole ground); see Boyette v. LeFevre, 246 F.3d 76, 91-92 (2d Cir. 2001) (finding prejudice by applying AEDPA to more exacting standard for prosecutorial suppression of exculpatory evidence, primarily because of hung jury) (cited by Second Circuit herein at 15a).

Williams v. Taylor, 529 U.S. 362, 395-99 (2000), but has repeatedly rejected--albeit under the circumstances of the particular cases--findings of unreasonable applications relying solely on the reasoning of the state court, e.g., Bell v. Cone, 125 S. Ct. 847, 853-56 (2005); Middleton v. McNeil, 541 U.S. 433, 437-38 (2004); Price v. Vincent, 538 U.S. 634, 640-43 (2003); Woodford v. Visciotti, 537 U.S. 19, 22-27 (2002) (per curiam).

Not surprisingly, the only case cited in the Petition--and the only case the undersigned could locate--in which a circuit court reached a different result in its application of Brecht and AEDPA/Chapman to the circumstances before it, is one in which the finding of an unreasonable application of Chapman focused on the reasoning of the state court, whereas the wholly result-oriented Brecht standard was not satisfied. Jones v. Polk, 401 F.3d 257, 264-66 (4th Cir. 2005). If this Court were generally disposed to grant certiorari to resolve the issue at hand--as well as the issue whether a finding of an unreasonable application may be based solely on the reasoning of the state court--Jones would be the sort of case in which it should do so.[11]

Significantly, this Court has declined in the past to grant certiorari on the very issue at hand. E.g., Kennedy v. Lockyer, 379 F.3d 1041, 1053-54 (9th Cir. 2004), cert. denied, No. 04-679, 73 U.S.L.W. 3621 (Apr. 18, 2005), Questions Presented reprinted at 73 U.S.L.W. 3403 (Jan. 11, 2005); Allen, 366 F.3d 319, Questions Presented reprinted at 73 U.S.L.W. 3124 (Aug. 24, 2004); Aleman v.

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[11]No petition for certiorari has been filed in Jones.

Sternes, 320 F.3d 687, 689-91 (7th Cir.), cert. denied, 539 U.S. 960 (2003), Questions Presented reprinted at 71 U.S.L.W. 3780 (June 17, 2003); Barker v. Yukins, 199 F.3d 867, 872, 874, 876 (6th Cir. 1999), cert. denied, 530 U.S. 1229 (2000), Questions Presented reprinted at 68 U.S.L.W. 3688 (May 2, 2000).[12]

Perhaps even more significantly, ever since this Court decided Brecht more than a decade ago, there has been a circuit conflict on a related issue as to which there is a clear difference between the two standards: whether a habeas court should apply Brecht or Chapman where the state court did not apply Chapman.[13] This

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[12]Both with respect to the issue at hand and with respect to the issue of the use of Brecht or straight Chapman analysis where the state court did not apply Chapman, see infra pp. 19-21 & note 13, there may be many additional cases other than those so identified in this Brief in which this Court declined invitations to resolve those issues. Unfortunately, United States Law Week--the only method reasonably available to the undersigned to ascertain the questions presented in cases in which this Court denied certiorari--rarely if ever discloses the questions presented in cases involving in forma pauperis applications where this Court denies certiorari.

[13]The Eighth Circuit has repeatedly held, both before and after the passage of AEDPA, that a habeas court should apply a straight Chapman analysis where the state court did not apply Chapman. E.g., Richardson v. Bowersox, 188 F.3d 973, 978-79 (8th Cir. 1999), cert. denied, 529 U.S. 1113 (2000); Lingar v. Bowersox, 176 F.3d 453, 458 (8th Cir. 1999), cert. denied, 529 U.S. 1039 (2000); Beets v. Iowa Dep't of Corr. Servs., 164 F.3d 1131, 1134 n.3 (8th Cir.), cert. denied, 528 U.S. 825 (1999); Cox v. Norris, 133 F.3d 565, 572 (8th Cir. 1997), cert. denied, 525 U.S. 834 (1998); Joubert v. Hopkins, 75 F.3d 1232, 1245 (8th Cir.), cert. denied, 518 U.S. 1029 (1996); Sidebottom v. Delo, 46 F.3d 744, 756 (8th Cir.), cert. denied, 516 U.S. 849 (1995); Williams v. Clarke, 40 F.3d 1529, 1540-41 (8th Cir. 1994), cert. denied, 514 U.S. 1033 (1995).

However, other circuits have reach the opposite conclusion. E.g., Hassine v. Zimmerman, 160 F.3d 941, 950-53 (3d Cir. 1998), cert. denied, 526 U.S. 1065 (1999); Smith v. Dixon, 14 F.3d 956, 979-80 (4th Cir.) (en banc), cert. denied, 513 U.S. 841 (1994); Pyles v. Johnson, 136 F.3d 986, 995 n.6 (5th Cir.), cert. denied, 524 U.S. 933 (1998); Billiot v. Pucket, 135 F.3d 311, 318 (5th

conflict centers on the following language from Brecht:

> State courts are fully qualified to identify constitutional error and evaluate its prejudicial effect on the trial process under Chapman, and state courts often occupy a superior vantage point from which to evaluate the effect of trial error. For these reasons, it scarcely seems logical to require federal habeas courts to engage in the identical approach to harmless-error review that Chapman requires state courts to engage in on direct review.

507 U.S. at 636 (citation omitted). Yet, over the years, this Court has repeatedly denied petitions for writs of certiorari to resolve the conflict on that more important issue. E.g., Fortini v. Murphy, 257 F.3d 39, 48-50 (1st Cir. 2001), cert. denied, 535 U.S.

Cir.), cert. denied, 525 U.S. 966 (1998); Hoque v. Johnson, 131 F.3d 466, 498-99 (5th Cir. 1997), cert. denied, 523 U.S. 1014 (1998); Mitzel v. Tate, 267 F.3d 524, 534 (6th Cir. 2001), cert. denied, 535 U.S. 966 (2002); Gilliam v. Mitchell, 179 F.3d 990, 994-95 (6th Cir. 1999), cert. denied, 528 U.S. 1120 (2000); Coe v. Bell, 161 F.3d 320, 335 (6th Cir. 1998), cert. denied, 528 U.S. 842 (1999); Tyson v. Trigg, 50 F.3d 436, 446-47 (7th Cir. 1995), cert. denied, 516 U.S. 1041 (1996); Anderson v. Calderon, 232 F.3d 1053, 1081 (9th Cir. 2000), cert. denied, 534 U.S. 1036 (2001); Willingham v. Mullin, 296 F.3d 917, 931 (10th Cir. 2002), cert. denied, 538 U.S. 1036 (2003); Toles v. Gibson, 269 F.3d 1167, 1176-77 (10th Cir. 2001), cert. denied, 538 U.S. 948 (2003); Walker v. Gibson, 228 F.3d 1217, 1236 (10th Cir. 2000), cert. denied, 533 U.S. 933 (2001); James v. Gibson, 211 F.3d 543, 554 (10th Cir.), cert. denied, 531 U.S. 1128 (2001); Rogers v. Gibson, 173 F.3d 1278, 1286 (10th Cir. 1999), cert. denied, 528 U.S. 1120 (2000); Walker v. Attorney Gen., 167 F.3d 1339, 1348 (10th Cir.), cert. denied, 528 U.S. 987 (1999); Davis v. Exec. Director, 100 F.3d 750, 772-73 n.20 (10th Cir. 1996), cert. denied, 520 U.S. 1215 (1997); Brewer v. Reynolds, 51 F.3d 1519, 1529 (10th Cir. 1995), cert. denied, 516 U.S. 1123 (1996); Horsley v. Alabama, 45 F.3d 1486, 1492 n.11 (11th Cir.), cert. denied, 516 U.S. 960 (1995).

The issue is still an open one in the First and Second Circuits. Benn v. Greiner, 402 F.3d 100, 104-05 (2d Cir. 2005); Sanna v. DiPaulo, 265 F.3d 1, 14 n.6 (1st Cir. 2001); Fortini v. Murphy, 257 F.3d 39, 48-50 (1st Cir. 2001), cert. denied, 535 U.S. 1018 (2002). See also Rompilla, 125 S. Ct. 2456, 2005 U.S. LEXIS 4846, at *28 (if state court does not apply the harmless-error standard for claim of ineffective assistance of counsel, then, under AEDPA, habeas court utilizes that standard de novo); Wiggins, 539 U.S. at 534 (same).

1018 (2002), Questions Presented reprinted at 70 U.S.L.W. 3627 (Apr. 9, 2002); Bains v. Cambra, 204 F.3d 964, 976-77 (9th Cir.), cert. denied, 531 U.S. 1037 (2000), Questions Presented reprinted at 69 U.S.L.W. 3368 (Nov. 28, 2000); Newman v. Hopkins, 192 F.3d 1132, 1137 (8th Cir. 1999), vacated and remanded on other grounds, 529 U.S. 1084 (2000), adhered to on remand, 247 F.3d 848 (8th Cir. 2001), cert. denied, 536 U.S. 915 (2002), Questions Presented reprinted at 68 U.S.L.W. 3617 (Mar. 28, 2000) & 70 U.S.L.W. 3466 (Jan. 22, 2002); Clemmons v. Delo, 124 F.3d 944, 956 (8th Cir. 1997), cert. denied, 523 U.S. 1088 (1998), Questions Presented reprinted at 66 U.S.L.W. 3533 (Feb. 17, 1998); Sherman v. Smith, 89 F.3d 1134, 1140-41 (4th Cir. 1996) (en banc), cert. denied, 519 U.S. 1091 (1997), Questions Presented reprinted at 65 U.S.L.W. 3373 (Nov. 19, 1996); Starr v. Lockhart, 23 F.3d 1280, 1291 (8th Cir.), cert. denied, 513 U.S. 995 (1994), Questions Presented reprinted at 63 U.S.L.W. 3330 (Oct. 25, 1994); Orndorff v. Lockhart, 998 F.2d 1426, 1429-30 (8th Cir. 1993), cert. denied, 511 U.S. 1060 (1994), Questions Presented reprinted at 62 U.S.L.W. 3514 (Feb. 8, 1994). See supra pp. 19-20 notes 12 & 13.[14]

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[14]A related issue is whether Brecht applies to cases brought under 28 U.S.C. § 2255, where, almost by definition, harmless-error analysis has not been applied by any court to the error in question prior to the filing of the section 2255 motion. Compare United States v. Montalvo, 331 F.3d 1052, 1057-58 (9th Cir. 2003) (per curiam) (Brecht applies), cert. denied, 541 U.S. 1011 (2004), Ross v. United States, 289 F.3d 677, 682 (11th Cir. 2002) (per curiam) (same), cert. denied, 537 U.S. 1113 (2003), and Murr v. United States, 200 F.3d 895, 906 (6th Cir. 2000) (same) with Santana-Madera v. United States, 260 F.3d 133, 140-41 (2d Cir. 2001) (open issue in Second Circuit), cert. denied, 534 U.S. 1083 (2002) and Lanier v. United States, 220 F.3d 833, 839 (7th Cir.) (applying beyond-a-reasonable-doubt standard to section 2255 case), cert.

Finally, this Court should be aware of the existence of the many arguments that support the choice of the Second and Eighth Circuits to use AEDPA/Chapman instead of Brecht when the state court applied Chapman. First, as just indicated, a significant concern underpinning Brecht was the notion that federal courts should not duplicate the efforts of state courts in applying Chapman. See supra p. 20. But that very concern is taken care of by AEDPA's section 2254(d)(1). There is no longer any duplication; rather, there is now deference. E.g., Williams, 529 U.S. at 408 n.*, 411. Indeed, an unnecessary expenditure of effort would arise if the federal courts not only reviewed the harmless-error decisions of the state courts for reasonableness under AEDPA, but then also applied the Brecht standard.

Second, and relatedly, section 2254(d)(1) also takes care of other concerns expressed in Brecht: finality, comity, and federalism. See Williams, 529 U.S. at 386 (opinion of Stevens, J.); Brecht, 507 U.S. at 635, 637. Indeed, the Petition acknowledges this. (Pet. at 22-23.)

Third, the issue in Brecht was whether the Kotteakos standard was "better" than the Chapman standard in the habeas context, and whether it made sense to use a "less onerous" standard than Chapman in habeas cases. Brecht, 507 U.S. at 623, 637-38. At that time, there was no AEDPA standard to choose from. But now that there is, it may well be that the AEDPA/Chapman standard, being "less

denied, 531 U.S. 930 (2000). This Court declined to resolve the issue in the Ross case. See 71 U.S.L.W. 3450 (Jan. 7, 2003).

onerous" than the straight Chapman standard, is the "best" of the three.

Fourth, this Court in Brecht indicated the need for the judiciary to fill the gap created by the fact that the habeas statute contained no harmless-error standard. The Brecht Court chose the Kotteakos standard, in part because that standard itself was grounded in the federal harmless-error statute. Brecht, 507 U.S. at 631, 633, 638. But now there is a harmless-error standard in the habeas statute: section 2254(d)(1) as applied to Chapman. See Lonchar v. Thomas, 517 U.S. 314, 323 (1996) (citing Brecht, 507 U.S. at 632-33, notes that it "is normally for Congress" to create the "legal principles" and engage in the "balancing of objectives" concerning habeas jurisprudence).

Fifth, another concern driving Brecht was that the federal habeas statute had no statute of limitations, and thus grants of habeas writs, through the erosion of memory and the dispersion of witnesses, could undermine society's interest in the fair and prompt administration of justice. Brecht, 507 U.S. at 637. But since the passage of AEDPA, the habeas statute has had a very short, one-year statue of limitations. 28 U.S.C. § 2244(d).

Sixth, there is nothing sacrosanct about using the Brecht standard in section 2254 cases. For example, this Court employs a different standard from Brecht (and Chapman) in habeas cases involving issues of ineffective assistance of counsel or prosecutorial suppression of exculpatory evidence, and that standard has survived Brecht. Kyles v. Whitley, 514 U.S. 419, 435-

36 (1995).

Seventh, and relatedly, since the passage of AEDPA, when the question of harmless error arises in habeas cases in the context of claims of ineffective assistance or suppression of exculpatory evidence, the courts do not use the Brecht standard; rather, the courts apply AEDPA to the harmless-error standard relevant to such claims which the state court was required to use. E.g., Holland v. Jackson, 542 U.S. 649, 124 S. Ct. 2736, 2737-39 (2004) (per curiam); Woodford, 537 U.S. at 22-27. The same should be true when the state court is required to apply Chapman.

Finally, as this Court noted in Kyles, "'It is unnecessary to add a separate layer of harmless-error analysis to an evaluation of whether a petitioner in a habeas case has presented a constitutionally significant claim" by using the Brecht standard where another standard exists. 514 U.S. at 436 n.9 (quoting Hill v. Lockhart, 28 F.3d 832, 839 (8th Cir. 1994)). This is particularly so where the Brecht standard is quite similar to the existing standard. Id. at 838. Hence, there is no reason to add a Brecht layer to AEDPA/Chapman, or to supplant AEDPA/Chapman with Brecht.

Accordingly, this Court should not grant certiorari on the question of whether the Second Circuit was correct in using the AEDPA/Chapman standard instead of the Brecht standard.

No. 04-1520

Supreme Court, U.S.
FILED
AUG 3 - 2005
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IN THE

Supreme Court of the United States

PEOPLE OF THE STATE OF NEW YORK,

Petitioner,

—against—

GUY ZAPPULLA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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August 3, 2005

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
ARGUMENT	1
CONCLUSION	9

TABLE OF AUTHORITIES

Cases:	PAGE
Allen v. Lee, 366 F.3d 319 (4th Cir.), *cert. denied*, 125 S. Ct. 208 (2004)	2
Bradley v. Meacham, 918 F.2d 338 (2d Cir. 1990), *cert. denied*, 501 U.S. 1221 (2004)	7
Brecht v. Abrahamson, 507 U.S. 619 (1993)	*passim*
Calderon v. Coleman, 525 U.S. 141 (1998)	2, 5
Chapman v. California, 386 U.S. 18 (1967)	1, 4-5
Davis v. United States, 512 U.S. 452 (1994)	7
Edwards v. Arizona, 451 U.S. 477 (1981)	7
Francis S. v. Stone, 221 F.3d 100 (2d Cir. 2000)	3
Herrera v. Lemaster, 301 F.3d 1192 (10th Cir. 2002), *cert. denied*, 537 U.S. 1197 (2003)	2
Jones v. Polk, 401 F.3d 257 (4th Cir. 2005)	4
Jones v. Stinson, 229 F.3d 112 (2d Cir. 2000)	3
Miranda v. Arizona, 384 U.S. 436 (1966)	1, 5-7
Mitchell v. Esparza, 540 U.S. 12 (2003)	3
Turrentine v. Mullin, 390 F.3d 1181 (10th Cir. 2004), *cert. denied*, 125 S. Ct. 2544 (2005)	4
United States v. Ramirez, 79 F.3d 298 (2d Cir.), *cert. denied*, 519 U.S. 850 (1996)	7

PAGE

United States Statutes:

28 U.S.C. § 2254 3

REPLY BRIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ARGUMENT

In opposing the petition for a writ of certiorari, defendant mischaracterizes the facts in the record relating to the first question presented in the petition, which is whether, and under what circumstances, warnings pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966), lose their efficacy because of the passage of time. In addition, defendant attempts to trivialize the recurring controversy among the federal courts of appeals relating to the second question raised in the petition, which is whether *Brecht v. Abrahamson*, 507 U.S. 619 (1993), applies to post-AEDPA claims of trial error. However, defendant fails to show that either of the two questions raised by the petition is unworthy of the Court's review.

1. Although defendant attempts to trivialize the debate over whether the applicable standard of harmless error is the *Brecht* standard or an unreasonable application, under section 2254(d)(1), of *Chapman v. California*, 386 U.S. 18 (1967), and suggests that the question of which standard all federal courts should apply before undoing a state conviction scarcely matters (Brief in Opposition ["Br. Opp."] at 16-17), defendant is way off the mark. First, the issue of which standard federal courts should apply to habeas review of state convictions matters enormously to all of the states, as well as to all state prisoners who seek federal habeas relief, because the resolution of that issue potentially affects every state prisoner's claim of constitutional trial error found harmless by the state courts.

For the same reason, this issue should matter, and evidently does matter, to the federal judiciary. Defendant's opposing brief lists numerous federal cases in which the issue of the application of *Brecht* after AEDPA has been raised, in various permutations, and in which the divided views of the courts of appeals have been aired and commented upon (Br. Opp. at 22-25 & n.13). Defendant expressly acknowledges, as he must, that there is a conflict in the circuits on the issue (Br. Opp. at 16), despite his pains to distinguish and minimize this conflict.

The frequency with which the question of the *Brecht* standard's application after AEDPA continues to arise signals that the question is an important and appropriate one for this Court's consideration. A significant body of decisional law has developed, adding to and informing the debate about the appropriate standard and rendering the controversy ripe for the Court's determination. At least two of the courts of appeals have now considered en banc whether the *Brecht* standard applies after AEDPA, both holding that *Brecht* does apply. *Herrera v. Lemaster*, 301 F.3d 1192 (10th Cir. 2002) (en banc), *cert. denied*, 537 U.S. 1197 (2003); *Allen v. Lee*, 366 F.3d 319, 321-22 (4th Cir.) (en banc, per curiam), *cert. denied*, 125 S. Ct. 208 (2004).

This Court has previously recognized the need for consistency in the legal standards applied to habeas review of trial errors. *See, e.g., Calderon v. Coleman*, 525 U.S. 141, 145-46 (1998) (per curiam) (reversing Ninth Circuit, where it failed to apply *Brecht* test before granting habeas relief). Defendant's arguments opposing the State's petition overlook this Court's role in achieving consistency in such standards and preserving the balance of interests underlying the *Brecht* decision and the AEDPA amendments, a balance endangered by the

Second Circuit's incorrect interpretation of *Mitchell v. Esparza*, 540 U.S. 12 (2003) (per curiam).

Prior to AEDPA, the habeas statute itself "sa[id] nothing about the standard for harmless-error review in habeas cases." *Brecht*, 507 U.S. at 631. Although defendant asserts that the habeas statute, as amended by AEDPA, itself now supplies the harmless error standard for trial error in habeas cases (Br. Opp. at 27-28), that assertion is highly debatable, and given the conflict in the circuits, the Court is now the proper forum for that debate. "In the absence of any express statutory guidance from Congress, it remains for this Court to determine what harmless-error standard applies on collateral review . . . ." *Brecht*, 507 U.S. at 633.

Contrary to defendant's arguments, the circumstances of the present case make the question of whether *Brecht* remains applicable after AEDPA particularly well-suited for the Court's review at this time. First, whether or not *Brecht* is applied in this case apparently makes a difference in the outcome. The district court applied *Brecht* and denied habeas relief, but the Second Circuit, without applying *Brecht*, granted habeas relief. Moreover, the Second Circuit, describing AEDPA's unreasonable application standard in section 2254(d)(1) as "somewhere between 'merely erroneous and unreasonable to all reasonable jurists,' " has stated that the increment of incorrectness beyond error required before granting habeas relief to a state prisoner " 'need not be great.' " *Jones v. Stinson*, 229 F.3d 112, 119 (2d Cir. 2000) (quoting *Francis S. v. Stone*, 221 F.3d 100, 109, 111 [2d Cir. 2000]). Thus, the Second Circuit apparently does not read the unreasonable application standard to require substantial deference to a state court's determination that a constitutional error was harmless.

The fact that only two of the three judges on the Second Circuit panel agreed that habeas relief should be granted for defendant's claim and that the third judge dissented, concluding that there was "overwhelming" evidence of defendant's guilt (App. at 28a, 54a), further demonstrates that a difference in the standard used could tip the balance the other way. *See, e.g.*, *Jones v. Polk*, 401 F.3d 257 (4th Cir. 2005) (holding that state court's harmless error determination was unreasonable application of *Chapman*, but that error was harmless under *Brecht*); *Turrentine v. Mullin*, 390 F.3d 1181, 1190-91 (10th Cir. 2004) (although state court determination of harmless error in jury instruction was "contrary to clearly established federal law," habeas claim based on instruction was rejected, because error was harmless under *Brecht*), *cert. denied*, 125 S. Ct. 2544 (2005).

Moreover, although this is not the first time that the question of whether the *Brecht* standard still applies after AEDPA has been raised in a petition for a writ of certiorari, this does appear to be the first case in which a court of appeals has refused to apply the *Brecht* standard before *granting* a state prisoner habeas relief on a post-AEDPA claim of constitutional trial error that the state court found harmless under the *Chapman* standard. None of the cases cited by defendant (Br. Opp. at 22-25) featured such a scenario. Thus, the facts and the posture of this case place the *Brecht* issue in sharp focus for the Court's examination.

In addition, by taking up the question of the application of *Brecht* in this case, this Court may well resolve uncertainty about the application of *Brecht* to cases in which the state court did not expressly undertake harmless error analysis under *Chapman*. If the Court ultimately agrees with the State that habeas relief for trial error should not be granted unless the error is harmful

under *Brecht*, notwithstanding a conclusion by the federal court that the state court's harmless error determination involved an unreasonable application of *Chapman*, then such a holding by this Court could effectively resolve the question of *Brecht*'s applicability for most, if not all, post-AEDPA claims of trial error, for it would make little sense to say that *Brecht* applies when the state court's harmless error determination involved an unreasonable application of the Court's precedents, but not when the state court rejected the prisoner's federal constitutional claim on the merits and thus had no occasion to make a harmless error determination.

Finally, even if the number of cases in which the harmless error standard determined the outcome were few, the social costs of retrial are significant, and the State "is not to be put to this arduous task based on mere speculation that the defendant was prejudiced by trial error." *Calderon*, 525 U.S. at 146; *see Brecht*, 507 U.S. at 637. As Judge Raggi pointed out in her dissent in this case, the cost of retrial is "borne not only by the state, but by victims, witnesses, the judicial system, and society itself," and should not be underestimated (App. at 54a).

2. In connection with the *Miranda* question, defendant misrepresents the state suppression hearing record when he asserts that after defendant was given *Miranda* warnings, defendant "told the police that he did not wish to answer any questions about the theft, as he did not want to go to jail" (Br. Opp. at 2) and "he specifically told the police that he did not wish to make a statement about the alleged theft for which he was arrested" (Br. Opp. at 10). Contrary to defendant's assertion, the hearing record contains no such statement by defendant. Although the record shows that in the interview of March 17, 1998, after *Miranda* warnings were given, defendant did not talk about the theft and burglary that the detective was

interested in investigating, the record does not contain any statement by defendant to the police saying that he did not wish to speak about the theft or otherwise expressing an invocation of his right to remain silent.

The record shows that defendant agreed to speak with Detective Delahunt after Detective Delahunt administered *Miranda* warnings (Delahunt: H. 41-43).[1] Defendant said to Detective Delahunt that he could not go to jail, that he was a mob informant, that he at one time had been in a witness protection program, and that he could not go to jail because he would be killed in jail (Delahunt: H. 43). Defendant volunteered to Detective Delahunt that he knew all the dealers in the precinct and that he could make drug buys of any drugs that Detective Delahunt wanted, in order to stay out of jail (Delahunt: H. 43-44). Detective Delahunt told defendant that he could not help defendant in that manner because there was a special unit that dealt with drugs, but he said he would try to get in touch with that unit (Delahunt: H. 44). Detective Delahunt made several telephone calls to have detectives from one of the special narcotics units come over, but no one was available (Delahunt: H. 45-46). Detective Delahunt also told defendant that he was investigating the theft of Margaret Tarulli's fur coat and jewelry, but they never talked about that incident (Delahunt: H. 44-45). Defendant "just wanted to talk to someone who could keep him out of jail" (Delahunt: H. 44-45).

Thus, defendant talked freely about matters other than the burglary and theft, and the fact that defendant did not say anything to Detective Delahunt about the burglary and theft does not mean that defendant invoked his right to remain silent.

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[1] Numbers in parentheses preceded by "H." refer to pages of the suppression hearing transcript; names preceding page numbers identify the witnesses whose testimony is cited.

Defendant also quotes hearing testimony out of context to suggest that he invoked his right to counsel (Br. Opp. at 3), and fails to acknowledge that defendant immediately made clear, without any questioning from the police, that he had not invoked his right to an attorney but rather was asking to have a district attorney present, because he wanted a written guarantee of the death penalty (Delahunt: H. 59-60; McMahon: H. 95-96, 100-02).

Defendant suggests that questions concerning his alleged invocation of his right to silence and his right to an attorney render the *Miranda* question presented by the petition unsuitable for review (Br. Opp. at 14), but that suggestion is unjustified. The Appellate Division articulated its reasons for finding that defendant's confession to the police should have been suppressed (App. at 77a-78a), but the Appellate Division did not give as one of those reasons that defendant had invoked either his right to remain silent or his right to counsel. Furthermore, nothing in the precedents of this Court or even those of the Second Circuit would have required the Appellate Division to find that defendant had invoked his right to remain silent or his right to counsel. *See Davis v. United States*, 512 U.S. 452, 459-61 (1994); *Edwards v. Arizona*, 451 U.S. 477 (1981); *United States v. Ramirez*, 79 F.3d 298, 305 (2d Cir. 1996) (defendant did not invoke right to remain silent, where he neither remained entirely silent nor stated that he wished to be asked no further questions), *cert. denied*, 519 U.S. 850 (1996); *Bradley v. Meacham*, 918 F.2d 338, 342 (2d Cir. 1990) (finding no invocation of right to remain silent, where defendant initially stated that he did not wish to discuss involvement in crime but immediately denied any connection to robbery and proffered explanation of his whereabouts at time of crime), *cert. denied*, 501 U.S. 1221 (1991).

In addition, defendant misrepresents the timing and sequence of events to suggest that the police caused defendant's visit to the hospital to be cut short so that the police could question defendant. Defendant asserts that at 12:30 a.m., after returning to the precinct following the discovery of Scarpati's body, the police learned that defendant was still at the hospital and "had him brought back to the stationhouse for the questioning at 1:15 a.m." (Br. Opp. 2-3). But the record shows that when Detective Delahunt returned to the precinct after discovering the body, defendant was not at the hospital; rather, defendant was present at the precinct when Detective Delahunt arrived there at about 12:30 a.m. (Delahunt: H. 68, 128, 135). Nor is there any indication that the police caused defendant's hospital visit to be curtailed so that they could speak to him. After the discovery of Scarpati's body at about 6:00 p.m., the police simply arranged for defendant to be returned from the hospital to the precinct instead of to Central Booking (Delahunt: H. 127-28, 133-35). Thus, defendant's assertion that the police "had him removed from the hospital around 1:00 a.m. so that they could speak to him" (Br. Opp. at 12) is wrong and misleading.

Moreover, although defendant tries to make much of the fact that defendant was taken to the hospital after his brief escape and was therefore not continuously in a "police custodial environment" (Br. Opp. at 12), there is no question that it was the police who took defendant to the hospital, and that while defendant was in the hospital, he remained in police custody (Delahunt: H. 127). Thus, the only break in custody occurred when defendant escaped from the police momentarily when he was being escorted to Central Booking.